85-639

Supreme Court, U.S.
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No.

IN THE
SUPREME COUKT
OF UNITED STATES
October Term, 1985

DESERT OUTDOOR
ADVERTISING, INC.,

Petitioner,

vs.

NAEGELE OUTDOOR ADVERTISING
CO. OF CALIFORNIA, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Do the provisions of the "Highway Beautification Act of 1965, ('Act') 23 U.S.C. §§ 131, 136 and 319; Pub.L. 89-285, Title I, Sect. 101, Oct. 22, 1965, 79 Stat. 1028 extend to all lands adjecent to the Interstate Highway System and the primary system including 'Indian Reservations'?"

2. If so, does the 'Act' provide for the States to enforce its provisions on all lands adjacent to the Interstate Highway system and primary system including "Indian Reservations?"

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I

JURISDICTION

The opinion of the Supreme Court of California was filed on May 2, 1985. A timely petition for rehearing en banc was denied on July 10, 1985, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C § 1257(3).

II

STATUTES INVOLVED

The pertinent Federal statutes involved are public law 89-285, codified as 23 U.S.C. §§ 131, 136 and 319 as amended, referred to as the "Highway Beautification Act of 1965."

The pertinent State provisions involved are California Business & Professions Code 5200 et seq., referred to as the "Outdoor Advertising Act."

III

STATEMENT OF THE CASE

The Morongo band of Mission Indians (Band) is a federally recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The United States holds the land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . .".

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. A relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities.

Upon determining that a substantial source of revenue could be realized from outdoor advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor commercial advertising business.

The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele-Respondent). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C. § 415). Upon submission, approval was denied because the designed purpose, in the Department's opinion, would violate the California Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). Appeal was taken to the Interior Board of Indian Appeals, which resulted in the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office* (1979) (86 I. D. 680).

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. All billboards were placed so as to be viewed from the Interstate Highway 10 and contained commercial messages. On June 27, 1978, the California Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act, to control outdoor advertising consistent with state and federal law concerned with environmental, aesthetic and safety purposes.

Despite the department's warning that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimatley issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and permanent injuction against Naegele. The complaint alleged Naegele was in control of 16 non-complying outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were alleged and found in violation of California's Outdoor Advertising Act and the federal Highway Beautification Act. The California Department of Transportation identified these displays as public nuisance within the meaning of the California Act.

A preliminary injunction was granted on August 1, 1978. On November 6, 1981, in accordance with the department's motion, a summary judgment resulted.

The within action for which Petitioner herein seeks the Writ of Certiorari was filed on June 26, 1980, for unfair competition, intentional interference with prospective economic benefit, and negligent interference with prospective economic benefit. On December 12, 1980, Naegele's demurrer was sustained to Desert's nuisance cause of action, the Court dismissed Desert's intentional interference with prospective economic benefit causes of action but granted Desert's motion for summary judgment on its unfair competition cause of action.

Accordingly, the Court enjoined Naegele from maintaining advertising structures on the reservation without complying with California's Outdoor Advertising Act.

Naegele was ordered to remove all non-complying structures.

The trial court consolidated the California Department of Transportation's action with Desert's action against Naegele. The consolidation was carried through the Supreme Court of California. The Court of Appeals affirmed the trial court (Appendix A), the Supreme Court of California reversed (Appendix B), and denied a rehearing (Appendix C).

Your Petitioner herein is informed that the California Department of Transportation is petitioning this Court for a Writ of Certiorari. In an effort to minimize judicial effort, this Petition should be consolidated with that of the Department of Transportation.

REASONS FOR GRANTING THE WRIT.

A. THE HIGHWAY BEAUTIFICATION ACT OF 1965 ("ACT") APPLIES TO INDIAN RESERVATIONS ADJACENT TO THE INTERSTATE HIGHWAY SYSTEM AND THE PRIMARY SYSTEM.

It was the declared intention of Congress in the Act, Title 23, Section 131(a) that the erection and maintenance of outdoor advertising signs adjacent to the Interstate System and the primary system be controlled to protect the public investment, promote safety, preserve natural beauty and recreational value of public travel. Congress did not exempt from the prohibitions of the Act any portion or parcel of land adjacent to the Interstate and primary system. In fact, they did just the opposite.

Congress mandated in Section 131(h) that,

> "(h) All *public lands* or *reservations* of the United States which are adjacent to any portion of the Interstate System and the primary system shall be *controlled* in accordance with the provisions of this section and the national standards promulgated by the Secretary." (Emphasis added).

It was the intent of Congress to include "all public lands or reservations of the United States . . .".

23 U.S.C. Section 103(e)(i) designates the Interstate System within the United States and District of Columbia to not exceed 41,000 miles in total.

There is no doubt that Congress intended the Act to be uniformly applied to the entire system. Congress was well aware that Indian reservations abutted and were adjacent to the Interstate System and primary system in many areas of this country, yet, the legislative history, including committee hearings, reflect that Senators Holland and Randolph, who guided the legislation, intended uniform and not checkerboarded or spotty application.

> "Mr. Cooper: 'First, this is a national program . . . I do not consider this bill to be based on voluntary compliance . . . no state could refuse to accept the program . . . I doubt if any bill has ever been passed which allowed the federal government to prescribe a program for the whole nation . . . and then fix a penalty on the states . . .' *Congressional Record* Vol. III, Part 18, 89th Cong. 1st Sess., pgs. 23796-23799.
>
> "Mr. Holland: 'My first question is this: Will the Senator indicate for the record the precise mileage of highways proposed to be covered by the bill? I understand that the present Interstate system is

authorized at 41,000 miles. I understand that the whole of that mileage is proposed to be covered, whether presently existing or to be contemplated in the future. Is that correct?

"Mr. Randolph: 'The Senator is correct. There is 41,000 miles of Interstate Highways designated to be covered under the provisions of the pending bill.' *Congressional Record*. Vol. III, Part 18, 89th Cong. 1st Sess., at pg. 23874."

That Indian reservations were intended to be included within the meaning of "all public lands or reservations . . . " was made known during the Floor Debates and Committee Hearings, by those who opposed the passage of the Act as follows:

"Mr. Cramer: 'I was in South Dakota a few years ago . . . We were directed along the highways to those places which visitors want to see, such as . . . the buffalo sanctuary, the Indian reservations, Mt. Rushmore . . . What is going to happen to the average tourist if this bill is enacted, sofar as being able to enjoy these things?' *1965 Hearings Before House Subcommittee on Roads on H.R. 8487 and Related Bills, at pg. 357.*

'Mr. Mundt: 'Mr. President, I oppose the proposal . . . tourists rely, in large part, upon highway signs . . . Let me cite a couple of illustrations. A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations . . . South Dakota has at least five great Indian reservations . . . Our fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . . but there is no way in the world that tourists who desire to

take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation . . .'. *Congressional Record*, Vol. III, Part 18, 89th Cong., 1st Sess., at pg. 24123.

'My sole concern is . . . application of the Act to 'all public lands or reservations' . . . If it is intended that this provision should apply to all land owned by the Federal Government, it appears reasonable . . . The term 'public lands' usually denotes a . . . part of the public domain of the United States. Actually, this type of regulation of use should apply equally to all lands owned by the Federal Government regardless of whether they are public or acquired lands . . . Likewise, the term 'reservations' has an indefinite meaning . . . If . . . it is intended to cover, for example, Indian reservations, it should be kept in mind that such reservations are not owned by the United States but are rather held in trust by the United States for the various Indian tribes.' [suggesting an alternative phraseology, to exclude Indian reservations, not adopted by the Committee] Statement of Wayne N. Aspinall, Representative from Colorado, 1965 House of Hearings Before Subcommittee on Roads, on H. R. 8487 and Related Bills, at pgs. 217 218."

On April 17, 1967, the Associate Solicitor for Indian Affairs rendered an opinion to the United States Department of the Interior #M-36703 that the Highway Beautification Act of 1965 applies to Indian reservation lands. It was stated therein that Interior's file contained nothing to indicate that Indian lands were regarded as

excluded from the operation of the Act and noting that, at the time of passage, Congress consulted with both Interior and the Bureau of Indian Affairs, who supported the legislation at the time of passage.

B. THE ACT PROVIDES FOR THE SEVERAL STATES TO ENFORCE ITS PROVISIONS ON ALL LANDS ADJACENT TO THE INTERSTATE SYSTEM AND PRIMARY SYSTEM INCLUDING "INDIAN RESERVATIONS."

The California Supreme Court misinterpreted the Congressional policy set forth in the Highway Beautification Act of 1965, when they said:

> "We therefore conclude that, even if Congress intended the Outdoor Advertising Standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of the state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes State regulation of outdoor advertizing on Indian reservation lands".

The philosophy of the Congress can only be understood by resorting to the entire Federal Aid Highway Act of 1958 (72 Stat 767). In 1958 the Congress passed the initial Highway Beautification Act (former Section-131) and gave the states one-half of one percent of the gross highway expenditures if they agreed to comply therewith. That Act declared it "to be in the public interest to *encourage* and *assist* the States to control the use of and to improve areas

adjacent to the Interstate System . . . " (former Section 23 U.S.C. 131(a)). (Emphasis added).

Former Section 131(d) read as follows:

> "(d) Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection."

Hence, the philosophy of the 1958 Act was to set national standards for highway beautification and seek the aid of the States by enlisting them to obtain uniformity in areas of State control. Whenever the State lacked jurisdiction to bring about a change, such as public lands and reservations, the Secretary of Commerce was to enter into agreements with the various agencies having jurisdiction and those agencies were "directed" to cooperate fully with the Secretary of Commerce to carry out the national policy.

Whether one-half of one percent of the gross highway expenditures was insufficient to create the proper result, or insufficient cooperation of the Federal Agencies with the Secretary of Commerce, or whatever be the reason, Congress changed its entire philosophy and enacted a new policy in the manner in which it approached the problem in the Highway Beautification Act of 1965.

In that Act, which we are concerned with herein, the Congress decided that the national standards would be set by the Secretary of Transportation in areas outside of urban areas and by agreement between the several States and the

Secretary in urban areas. That "enforcement" of the Act would be left to the States since Congress omitted any direction to other agencies to cooperate with commerce to carry out the "national policy". Thus, the Congress sought to draw the distinction between the applicable standards governing billboard advertisement on Interstate and primary highways on the one hand and enforcement of those standards on the other hand.

23 U.S.C. 131(a) declares the policy of the 1965 Act. It states that erection and maintenance of outdoor advertising, signs, etc., in areas adjacent to the Interstate and primary system "should be *controlled* in order to protect the public investment . . ., promote the safety . . . and to preserve natural beauty; (Emphasis added). Thus, instead of the policy being to "assist the States to control" the policy now becomes a single centralized control.

23 U.S.C. 131(b) deducts 10% of Federal Highway Aid to any State which the Secretary determines has not made provision for "effective control" of the erection and maintenance along the Interstate and primary system of outdoor advertising signs, etc.. Thus, the policy is a single control to protect the public interest and any State not making provision to effect such control loses a substantial portion of its Highway Aid. It will further be noted that the detriment to the State for not going along with the Federal policy is twenty times that of the 1958 Act.

23 U.S.C. 131(c) defines "effective control" as the removal of all billboard commercial advertising signs within 660 feet ofthe right of way and those visible to travellers on the right of way beyond 660 feet, excepting;

(1) Directional and official signs including scenic historical, natural wonders, etc.;

(2) Signs or displays advertising the sale of the property on which they are located;

(3) Signs, displays, etc., advertising activities conducted on the property on which they are located;

(4) Landmark signs, and signs of historic or artistic significance as determined by the Secretary of Transportation; and

(5) Signs or displays by non-profit organizations for free coffee to travellers.

23 U.S.C. 131(c) is applicable in areas "outside of urban areas". It provides that the Secretary of Transportation be authorized to promulgate national standards in (1) and (4), supra. Hence, if a State does not enforce the provisions of 23 U.S.C. 131(c), it loses 10% of its Highway budget. Therefore, it is practically mandatory on the State of California, through it's Department of Transportation to enforce the Secretary's promulgated standards on the Indian reservation.

23 C. F. R. Section 750705 defines effective control as follows:

"In order to provide effective control of outdoor advertising, the State *must*:

(a) . . .
(b) . . .
(c) . . .
(d) Remove illegal signs expeditiously;
(e) . . .
(f) . . .
(g) . . .
(h) . . .

> (i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrance and cause their prompt removal; and . . ."
> (Emphasis added).

23 U.S.C. 131(d) refers to areas zoned industrial or commercial or unzoned commercial or industrial areas. In such areas over which the State has power, its zoning determination will be accepted for purposes of the Act. In areas which are unzoned commercial or industrial, as well as the former areas zoned by the State, both the State and the Secretary, by agreement, will determine the signs, displays, etc., their size, lettering and spacing in accordance with customary usage.

Hence, the standards are set by agreement between the States and the Secretary of Transportation. "Effective control" or enforcement is left in the hands of the States.

23 U.S.C. 131(j) provides that any State Highway Department which has an agreement with the Secretary in effect on June 30, 1965, to *control* the erection and maintenance of outdoor advertising signs adjacent to the Interstate System, shall be entitled to recieve bonus payments set forth in the agreement but shall not be entitled to same unless the State maintains *control* required under the agreement. In order to make clear that an agreement entered into on or before June 30, 1965, did not satisfy the requirements of 23 U.S.C. 131(a) (b) and (c), so as to save the 10% deduction for the State, the last sentence of 23 U.S.C. 131(j) reads as follows:

> "The provisions of this subsection shall not be construed to exempt any State from *controlling* outdoor advertising as otherwise provided in this section". (Emphasis added).

Petitioner verily asserts that Congress intended the Beautification Standards be set either by the Federal Government or the Federal Government in cooperation with the State Government. The "effective control" in the "Act" means enforcement and the States' reward for such enforcement is not losing 10% of its Highway Aid Funds.

C. FEDERAL PREEMPTION IS NOT RELEVANT

1. THE STATES ARE REQUIRED TO ENFORCE THE "ACT".

This case involves federal "authorization and direction" to the States that make provision for "effective control" of the erection and maintenance of advertising along the Interstate and primary highway system. The court below erred when it stated that Congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. The California Supreme Court, in support of that proposition cites regulations promulgated by the Secretary of Interior for the issuance of permits for outdoor advertising on public lands under the jurisdiction of the Bureau of Land Management and cites *Ryan Outdoor Advertising, Inc., v. United States* (9th Cir. 1977) 559 F.2d 554. That case holds that when the Congress has authorized the (federal) Department of Transportation to set general standards on outdoor advertising which apply to public lands other departments must abide thereby. What it means is that;

> "If the Secretary of the Interior chooses to permit signs on public lands, they are to conform to the standards set by the Department of Transportation under the Highway Beautification Act. But if

> the Secretary of the Interior, in the exercise of his authority over federal lands, decides that no outdoor advertising will be permitted on public lands whatsoever, the Highway Beautification Act simply does not apply." p. 557.

Petitioner herein advocates that the "Highway Beautification Act of 1965" contains within it the formula for determining what will and what will not be permitted advertising adjacent to Interstate and primary highways. Some of these standards are set by the Secretary of Transportation, outside of urban areas, and by the Secretary in cooperation with the States, by agreement, in urban areas zoned commercial and industrial. All *RYAN* teaches us is that all Department's Regulations having jurisdiction over Public Land and Reservations are required to conform to the standards of the Department of Transportation concerning Highway Beautification.

Petitioner is urging that enforcement of these standards has been "authorized and directed" by 23 U.S.C. 131(b) through enactment of State Laws, i.e., California Business and Professions Code 5200 et seq..

2. THE DELEGATION TO ENFORCE THE HIGHWAY BEAUTIFICATION FROM CONGRESS TO THE STATES IS CLEAR AND UNAMBIGUOUS.

The court below erred in two further respects. That Court held that where Congress authorizes state regulation on an Indian reservation that the mandate must be clear and unambiguous.

(a) The authorization herein was not for regulation but rather for enforcement. Regulation is the right to set standards which may vary. That can only be accomplished by the Secretary of Transportation or the Secretary in agreement with the States, 23 U.S.C. 131 which provides for Federal Regulation.

(b) The *authorization* for state enforcement was more in the nature of a "direction, order or command" to maintain "effective control" or lose 10% of their Highway apportionment. By shrinking the State's apportionment in an amount twenty times that of the 1958 Act Congress has created a "clear and unambiguous" mandate.

(c) The Supreme Court of California erred further in assuming that the States could not achieve compliance on Indian reservation land since the land is not subject to State powers of eminent domain and the States are not authorized to enforce their land-use regulations on Indian reservations. Additionally, Indian tribes are immune from suit in the absence of a waiver of sovereign immunity.

23 U.S.C. 131(g) determines the compensation to be paid for sign removal as follows:

"(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays and devices thereon."

(1) There is no condemnation of lands required for sign removal, just merely removing the sign. The Morongo Band still has its reservation — they just won't have the signs.

(2) As to zoning 23 U.S.C. 131(d) provides for State zoning where the areas adjacent to the Interstate and primary system are under authority of State Law and zoning by agreement between the Secretary and "the Several States" "in unzoned commercial or industrial areas." All other areas located outside of urban areas are governed by 23 U.S.C. 131(c). Hence, the Congress covered all zoned, unzoned and to be zoned areas including Indian reservations.

(3) Sovereign Immunity. The California Supreme Court felt that without a waiver of sovereign immunity the States could not enforce the Act against Indian tribes.

Section 5461 of the California Business and Professions Code make non-conforming advertising displays a nuisance; Section 5464 makes violation of these provisions a misdemeanor. Hence, enforcement is obtained through the State's penal provisions.

D. NO RATIONAL RELATIONSHIP EXISTS BETWEEN THE HIGHWAY BEAUTIFICATION ACT AND THE RIGHT OF RESERVATION INDIANS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

No doubt that Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, U.S. Const. Art. 1, Sect. 8, Cl. 3. *United States v. Wheeler* 435 U.S. 313, 322-323, 98 S.Ct. at 1085-1086 (1978).

Does the Highway Beautification Act unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them?" *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959).

> "The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian Self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop'. *McClanahan v. Arizona Tax Commission*, supra, at 172, 93 S. C., at 1262 against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker* 448 U.S. 136, 143, 100 S.Ct. 22578, 2583 (1980).

We are dealing here with a unique situation. Does 23 U.S.C. 131 require compliance by Indian Reservations adjacent to the Interstate and primary highway system and if so, does 23 U.S.C. 131 by its provisions direct the State to enforce that compliance?

Most of the matters dealt with by this Court involved State enforcement of State laws which were not enacted in

cooperation with and under Federal compulsion as was the Highway Beautification Act of 1965.

In this case the issue is whether the Federal Law, 23 U.S.C. 131, is so vague or ambiguous so as to require it to be measured against the "backdrop" provided in our heritage by the traditional notions of Indian Self-government. This tradition includes the firm Federal policy of "promoting tribal self-sufficiency and economic development". *White Mountain Apache Tribe v. Bracker*, supra, p. 144.

Here we assert authority over the conduct of non-Indians engaging in activity on the reservation. Because of the substantive subject matter it should make no difference whether we are dealing with Indians or non-Indians.

Here the exercise by State authority enforces Federal Law rather than violates it. The remaining issue is whether the Federal Law (23 U.S.C. 131) is so vague and ambiguous that the presumption in favor of Indians carry the day. *Bryan v. Itasca County* (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710.

Generally, the Act (23 U.S.C. 131) seeks to make safe, beautify and promote the recreational value of the public highways in the United States.

The Act refers to the Interstate System and the primary system (23 U.S.C. 131(b) and includes "All public lands on reservations of the United States" (23 U.S.C. 131(h)) making no exception for Indian reservations. It would torture the language to write in an exception.

Nevertheless, what is the relationship between maintaining advertising billboards on Indian reservations in violation of 23 U.S.C. 131 and Indian government, self-determination, self-sufficiency and economic development?

1. The billboards are advertising the sale of commercial products. They are not landmark signs, historic signs or of historic significance. They do not provide information in the specific interest of the traveling public, such as directional information.

It is difficult to believe that Congress intended to beautify the Interstate and primary highway system while leaving those highways adjacent to Indian Reservations in their distressed condition.

It is difficult to believe that Congress intended to make safe all Interstate and primary highways while leaving those highways adjacent to Indian reservations in their prior unsafe condition.

2. The advertising billboards face the highways and can only be seen by the passerby travelling public. In *Rice v. Rehner*, __U.S__, 103 S.Ct. 3291, 3298 (1938) this Court paid particular attention to the off-reservation effect of the activity. In that case, dealing with liquor licenses this Court stated at p. 3298:

"Liquor sold by Rehner to other Pala Tribal members or to non-members can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control. This particular 'spillover' effect is qualitatively different from any 'spillover' effects of income taxes or taxes on cigarettes. 'A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State

intervention'. *New Mexico v. Mescalero Apache Tribe*, __U.S__, __, 1035 S.Ct. 2378, 2387, 75 L.Ed.2d__ (1983)".

The "spillover" as to billboards is total. They have no effect on the reservation in fact, they can only be viewed, as to their commercial message, from the Highways. Their entire impact is off the reservation.

3. Petitioner finds no assertion of any tradition of tribal immunity that may be repealed only by an explicit directive from Congress. Petitioner is not aware of traditional placing of commercial signs advertising products to passers by on Indian Reservations. Petitioner cannot find any rational relationship between placement of such signs and the Indians right to self-government or self-determination.

While the placement of such signs does produce revenue for the tribe it does not give rise to any economic development in the sense that it creates employment in an industrious effort where the Indian is perfecting skills, producing commodities and developing an enterprise. If self-sufficiency means developing one's talents, skills and ability, billboard signs won't help.

4. The Highway Beautification Act of 1965 is so all inclusive in its application to the entire country that it leaves no room for checker-board exceptions such as Indian reservations. Had the Indian reservations been advertising historic or scenic incidents or events, respondent's position could be understood. But, when the advertisement

contains exactly that commercial message which the statute condemns, then it must fail.

CONCLUSION

It is for these reasons that we ask the Court to grant this Petition.

DATED: September 30, 1985

Respectfully submitted,

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APPENDIX A

COPY

SUPREME COURT
FILED
MAY 2, 1985
LAURENCE P. GILL, Clerk

Deputy

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

**THE PEOPLE ex rel.
DEPARTMENT OF
TRANSPORTATION,**
Plaintiff and Respondent,
v.
L.A. 31911
(Super. Ct. No. 126069)
**NAEGELE OUTDOOR
ADVERTISING COMPANY
OF CALIFORNIA, INC.,**
Defendant and Appellant.

**DESERT OUTDOOR
ADVERTISING, INC.,**
Plaintiff and Respondent,
v.
(Super. Ct. No. 137500)
**NAEGELE OUTDOOR ADVERTISING
COMPANY OF CALIFORNIA, INC.,**
Defendant and Appellant.

This case presents the question whether the State of California may regulate billboards on Indian reservations. Upon examination of the statutes, legislative history, and precedents involved, we conclude that the state's regulatory authority is preempted by federal law.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because resolution of these issues will have significant effect on the Morongo Band of Mission Indians, its request to file a brief amicus curiae was granted.

The Morongo Band of Mission Indians (Band) is a federally recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los

Angeles to popular Southern California desert communities.

In addition to the interstate highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents. The reservation's few natural resources yield little income so that, despite the Band's apparent advantageous location, its economy is depressed. Many of its members are unemployed and live in poverty.

For many years, the Band has derived a major part of its income from outdoor advertising activities. The Band's general membership has determined that the highest and best use of reservation land adjacent to Interstate 10 is for outdoor adversiting. In a 1977 appraisal report, the Southern California Appraisal Office of the Bureau of Indian Affairs came to the same conclusion.

Accordingly, the Band's general membership delegated to its tribal council authority to negotiate agreements for an outdoor advertising business. The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior (Interior) must approve such leases before they become effective. (25 U.S.C. § 415.) Upon submission, approval was denied because the lease's

purpose, in the Sacramento area director's opinion, would have violated the Highway Beautification Act (23 U.S.C. § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). The Band appealed this decision and the Interior Board of Indian Affairs reversed. In its opinion, the board concluded that the provisions of the Highway Beautification Act do not apply to Indian reservations and that California's Outdoor Advertising Act cannot be enforced on tribal Indian lands. (Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office (1979) 86 Interior Dec. 680 (Admin. Appeal).)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement[1] with Naegele. This agreement provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the California Department of Transportation (Department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act.

Despite the Department's warning and the implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department, filed a complaint and motion for preliminary and permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located

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[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

adjacent to Interstate Highway 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays were situated in violation of various provisions of the Outdoor Advertising Act. The Department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the Department's motion, summary judgment resulted.

Desert's action, here consolidated with that of the Department, was initially filed on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of action for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all noncomplying structures. The enforcement of this judgment was stayed pending appeal.

The question we must answer on appeal is whether the Department can, through the Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by the United States for the beneficial use of the Band. This inquiry requires us to consider several subsidiary questions.

In 1832, Chief Justice Marshall opined, with enviable clarity, that Indian tribes were wholly distinct nations

within whose boundaries "the laws of [a State] can have no force." (Worcester v. Georgia (1832) 6 Pet. 515, 561.) In the interim, however, the United States Supreme Court has departed from this view and acknowledged certain limitations upon tribal sovereignty. For example, " '[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance.*' " (Rice v. Rehner (1983) __U.S__ [103] S.Ct. 3291, 3295], quoting United States v. Wheeler (1978) 435 U.S. 313, 323, with added emphasis.)

It is apparent that Congress may delegate its power over the governance of Indian reservations to the states. The Department argues that, in the context of outdoor advertising, Congress has done so through the Highway Beautification Act.

The Highway Beautification Act of 1965 was enacted to provide for scenic development and road beautification of the federal-aid highway systems. Title I of the act (23 U.S.C. § 131) contains requirements for the control of outdoor advertising.

In general, the act seeks to eliminate outdoor advertising displays within 660 feet of the edge of any interstate or federal primary system highway. Toward this end, the act mandates a 10 percent cut in federal-aid highway funds to any state which fails to provide for "effective control" over the erection and maintenance of such displays. (23 U.S.C. § 131(b).)

Title 23 United States Code Section 131(c) explains that "effective control" means that, with five specified content-

based exceptions none of which apply in this case, all such displays shall be banned.[2]

The act clearly contemplates that the states will achieve compliance through their inherent powers of zoning and condemnation. (23 U.S.C.§ 131(d) - (g).) The act also provides that, at the states' option, advertising displays may be permitted within 660 feet of interstate and federal highways within areas zoned industrial or commercial under state law. (23 U.S.C.§ 131(d).)

California complies with the Highway Beautification Act through its Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). This act explicitly recognizes that outdoor advertising is a legitimate commercial use of property adjacent to roads and highways and provides that such advertising "should be allowed to exist in business areas." (*Id.*, § 5226.) The act also provides, however, that it is the policy of the state "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the

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[2] The act limits the content of such devices to five acceptable categories. Loosely defined, they are: (1) signs advertising scenic attractions, (2) signs advertising sale or lease of property upon which displays are located, (3) signs advertising activities conducted on the property on which displays are located, (4) landmark signs, and (5) signs advertising the distribution of free coffee to travelers. The signs in category 1 are to conform to standards regulating size, spacing, etc. "to be promulgated by the Secretary." (23 U.S.C. § 131(c).)

At the time of the enacment ofthe Highway Beautification Act in 1965, "the Secretary" was the Secretary of Commerce; in 1966, Congress created the Department of Transportation and all powers and duties under this act were transferred to the Secretary of Transportation (Pub. L. No.-89-670 (Oct. 15, 1966) 80 Stat. 931.)

traveling public is presented safely and effectively. . . ." (*Ibid.*)

The act then provides for restrictions upon outdoor advertising consonant with the provisions of the Highway Beautification Act. For example, outdoor advertisers must obtain permits before placing displays within 660 feet of the right-of-way of interstate and primary highways. (Bus. & Prof., Code, § 5350.) The content of allowable displays within this area is limited to the same categories as specified by the Highway Beautification Act. (*Id.*, § 5405.) Finally, certain safety measures involving size, spacing, and location are imposed. (*Id.*, §§ 5403, 5405, 5408.)

The Department contends that it may enforce the provisions of the Outdoor Advertising Act on Indian reservations because Congress expressly delegated such enforcement authority to the states through the Highway Beautification Act. Naegele and the Band, on the other hand, argue that this is a misinterpretation of the federal law.

Subdivision (h) of the federal act provides: "All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." According to the Department, this provision clearly expresses Congress's intention to include Indian reservations under the provisions of the Highway Beautification Act and to give states the authority to enforce the act's provisions on Indian reservations.

Naegele and the Band argue that the phrase "public lands or reservations of the United States" was not intended to include Indian reservations. They find support for this view in the opinion of the Interior Board of Indian Appeals.

(Admin. Appeal, supra, 86 Interior Dec. 680.) The board examined the statute, concluded that it was ambiguous, and interpreted its ambiguities in favor of the Indians. On this basis it concluded that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

The board's interpretation of the Highway Beautification Act is debatable (United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416, 419, affd. (9th Cir. 1914) 213 F. 601, 603) but we need not resolve that debate here. Even assuming that the act was intended to apply to Indian reservations, it does not follow that Congress has authorized *state enforcement* of the act on such reservations, or indeed on any federal lands.

Several years before the enactment of the Highway Beautification Act, Congress made an earlier attempt to regulate outdoor advertising adjacent to federally funded highways. In 1958, Public Law No. 85-767 (72 Stats. 885, former 23 U.S.C. § 131) established standards similar to those of the later act and similarly relied upon the states for enforcement. This legislation provided that states which agreed to comply with federal outdoor advertising standards would be entitled to a one-half of 1 percent bonus in federal highway funding. The section of this law applicable to federal lands read: "Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, *the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or r servations as may be necessary to carry out the national policy* . . . , and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection." (*Id.*, § 131(d), emphasis added.)

Thus the 1958 law clearly did not grant the states authority to enforce highway beautification provisions on federal lands and reservations. Rather, enforcement authority was reserved to the federal agencies having jurisdiction over such lands.

Desert argues that the fact that Congress did not repeat this language in the 1965 act is a clear indication that it wished to transfer enforcement authority over "public lands and reservations" from the federal agencies "having jurisdiction over such lands and reservations" to the states. We do not find this argument persuasive.

The House Report summarizing the legislataive intent of the Highway Beautification Act States "[section h] simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system *the same controls* covering other roads which are subject to this legislation." (1965 U.S. Code Cong. & Admin. News, p. 3717 (89th Cong., 1st Sess.), emphasis added.) This summary description could indicate that congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. Thus, the act's standards (or "controls") would apply to all public lands and reservations of the United States. But, while the states would enforce these controls on state-owned and on private lands through their zoning and condemnation authority, federal agencies would enforce the controls on federal lands through their independent statutory authority over such lands.

Administrative and judicial interpretations of the Highway Beautification Act support this view.[3] In 1970, the

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[3] The earliest administrative interpretation of the act of which we are aware is a memorandum opinion from the Associate Solicitor for Indian

Secretary of the Interior promulgated regulations for the issuance of permits for outdoor advertising on public lands under the jurisdiction of the Bureau of Land Management. (Former 43 C.F.R. 2921.0-6.)[4] These regulations effectively prohibited the issuance of permits for outdoor advertising which would not have complied with the standards of the Highway Beautification Act.

In 1977, the Ninth Circuit upheld these Interior Department regulations against a challenge mounted by an outdoor advertising company in Nevada which asserted, inter alia, that Interior's authority to regulate in this area had been preempted by the Highway Beautification Act. (Ryan Outdoor Advertising, Inc. v. United States (9th Cir. 1977) 559 F.2d 554.) The court noted that Interior's authority to administer the laws dealing with federal lands both well established and "almost plenary." "The fact that Congress has authorized the [federal] Department of Transportation to *set general standards* on outdoor advertising which apply to public lands as well as to private does not preempt continued regulation of the same public lands by the Secretary of the Interior. . . . [¶] There is simply

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Affairs to the Commissioner of Indian Affairs, Department of the Interior, dated April 7, 1967. This opinion is consistent with our interpretation. Although the opinion concluded that Indian reservations "are subject to regulation under the [Highway Beautification] [A]ct," it did not address the issue of state authority to enforce the act's provisions on federally owned lands and did not suggest that state enforcement had been authorized by Congress.

[4] These regulations, specifically directed toward the issuance of permits for outdoor advertising, disappeared in a general reorganization and renumbering of the regulations which occurred in 1981. The new regulations, which discuss the leasing of public lands in more general terms, make no specific mention of outdoor advertising. (46 Fed. Reg. 5777 (Jan. 19, 1981) 43 C.F.R. 2920.0-1 et seq.)

no indication that Congress intended in the Highway Beautification Act the significant alteration of a persuasive, well-established regulatory scheme. . . ." (*Id.*, at p. 556, emphasis added.)

In addition, recent precedents in other contexts establish that congressional authorization of the state regulation on federal property will be found only where Congress's mandate is explicit. In a pair of cases, the United States Supreme Court has considered the question whether federal statutes mandating state pollution legislation have the effect of subjecting federal installations and activities located within the states to state regulation. The court concluded that "[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " (Hancock v. Train (1976) 426 U.S. 167, 179, fns. omitted; see also EPA v. State Water Resources Control Board (1976) 426 U.S. 200.) These cases suggest that congressional authorization of state regulatory action on reservation land held in trust by the United States for the beneficial use of reservation Indians should require a similarly clear and unambiguous mandate.[5] We discern no such explicit mandate in the Highway Beautification Act.

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[5] See also State of Washington v. Environmental Protection Agency (9th Cir. Feb. 6, 1985) __F.2d__ (CA No. 83-7763) upholding the EPA's conclusion that the federal section 6901 et seq., "does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty" even though Indian tribes are clearly regulated entities under RCRA and the act authorizes state regulation in lieu of the federal program.

Further, as noted above, the Highway Beautification Act contemplates that the states will achieve compliance through the use of their inherent powers of zoning and eminent domain. Yet tribally owned Indian reservation land is not subject to state powers of eminent domain (Minnesota v. United States (1939) 305 U.S. 382; United States v. 10.69 Acres of Land (9th Cir. 1970) 425 F.2d 317), and states are not authorized to enforce their land-use regulations on Indian reservations (Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, cert. den. (1977) 429 U.S. 1038). Additionally, Indian tribes are immune from suit in the absence of an effective waiver or consent. (Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172.) The Supreme Court has held that, while Congress can authorize suits against Indian Nations, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58.)[6]

It appears logically imperative that, had Congress intended the states to enforce the provisions of the Highway Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue

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[6] In *Santa Clara Pueblo*, supra, 436 U.S. 49, the United States Supreme Court held that Congress's action in enacting the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-1303) which, in relevant part, provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" (§ 1302(8)), could not be interpreted as an implicit waiver of the tribe's immunity from suit. The court concluded that such a waiver requires an "unequivocal expression of . . . legislative intent. . . ." (*Santa Clara Pueblo*, supra, 436 U.S. at p. 59.)

Indian tribes. No such authorization can be found in the Highway Beautification Act.

We therefore conclude that, even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes state regulation of outdoor advertising on Indian reservation lands.

Both the Department and Desert argue alternatively that the act of August 15, 1953 (Pub. L. No. 83-280, 67 Stat. 589 (commonly known as Public Law 280)) confers upon the State of California the authority to enforce its Outdoor Advertising Act on Indian reservation lands. This position is untenable.

Although section 4 of Public Law 280, codified at 28 United States Code section 1360, appears to provide that all state laws of general application are effective on Indian reservations within the specified states,[7] the law has not been so construed by the federal courts. In Bryan v. Itasca County (1976) 426 U.S. 373, the Supreme Court, reasoning that "the primary intent of § 4 was to grant jurisdiction

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[7] Section 4(a), as codified at 28 United States Code Section 1360(a) (1976), provides: "(a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .: . . . California . . . All Indian country within the State."

over private civil litigation involving reservation Indians in state court" (*id.*, at pp. 385), concluded that Public Law 280 did not give Minnesota the authority to tax the personal property of Indians living on a reservation. More recently, the Ninth Circuit concluded that Public Law 280 does not authorize the enforcement of state and county laws controlling the conduct of bingo games on Indian reservations in California. (Barona Group of Capitan Grande Band, etc. v. Duffy (9th Cir. 1982) 694 F.2d 1185.) The court noted: "The Supreme Court . . . has construed [section 4] to mean that states have jurisdiction *only* over private civil litigation involving reservation Indians in state court. [Citation.] Thus a state may not impose general civil/regulatory laws on the reservation." (*Id.*, at pp. 1187-1188, emphasis added.) Neither Desert nor the Department advances any convincing argument why we should diverge from the *Barona* court's conclusion. We therefore conclude that state enforcement of the Outdoor Advertising Act on Indian reservations is not authorized by Public Law 280.[8]

For these reasons we determine that Congress has not authorized state regulation of outdoor advertising on Indian reservations. This does not end our inquiry, however.

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[8] The Department also appears to argue that the Secretary of the Interior's notice supplementing 25 Code of Federal Regulations section 1.4, published at 30 Federal Register 8722 (July 2, 1965), provides an independent basis for its assertion of state regulatory authority over Indian lands. This notice, however, specifically provides: "Nothing contained in this notice shall be construed to in any way alter or limit the provisions of [Public Law 280]." In light of this proviso, we are satisfied that the Secretary's directive is merely an attempt to interpret the aims of Congress in enacting Public Law 280. As such, it should not be construed to endow the state with broader general regulatory authority over Indian lands than mandated by the congressional enactment.

The United States Supreme Court has observed that under certain circumstances a state may validly assert authority over on-reservation activities even in the absence of a congressional mandate to do so. (New Mexico v. Mescalero Apache Tribe (1983) __U.S__ [103 S.Ct. 2378, 2384-2385].) It may be argued that this is such a case.

The Department cites Rice v. Rehner (1983) 103 S.Ct. 3291, Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, and Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, among others, as examples of cases in which state regulation of Indian activities has been found permissible. But these cases are inapposite.

In Rice v. Rehner, the court found that Congress had expressly provided for the application of state law. (*Rice*, supra, 103 S.Ct. 3291, 3302.) In Mescalero Apache Tribe v. Jones and Puyallup Tribe v. Washington Game Dept., the court scrutinized pertinent federal law and discerned no intent to preempt state authority. The situation is quite different here.

More than 10 years ago, the Supreme Court noted that, in the area of state regulation of tribal enterprises, generalizations have become treacherous. Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that "a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption . . ." (*New Mexico*, supra, 103 S.Ct. at p. 2386.)

Among these "familiar principles" is the following. Whether federal legislation preempts state law "is a matter of legislative intent. In ascertaining this intent, . . . the test . . . is whether the enforcement of law would conflict with the purposes of the federal legislation, whether by frustating an affirmative federal purpose or by interfering with a

matter intentionally left unregulated by Congress." (Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 591.)

The Highway Beautification Act clearly represents Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal highways throughout the United States. In Interior's view, Congress intended to leave Indian reservation lands entirely unregulated under the act. In our opinion, Congress may have intended the act's provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations. In either case, the assertion of the state regulatory authority in this area would clearly conflict with Congress's purposes, either by subjecting Indian enterprises exempt from control under the federal act to state regulation, or by imposing inconsistent state regulations in an area reserved for federal oversight.[9]

For this reason, we conclude that the state's regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed.[10]

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[9] Interior's authority to supervise the enterprise at issue here cannot be doubted. Under 25 United States Code section 415(a) Indian lands may be leased for business purposes only "with the approval of the Secretary of the Interior." In accordance with this statutory authorization, the Secretary has issued extensive regulations pertinent to the leasing of Indian lands. (25 C.F.R. § 162 et seq.)

The record amply indicates that the Band's outdoor advertising enterprise has been encouraged and approved by the Bureau of Indian Affairs. By contrast the Department has presented evidence that every one of the 16 advertising displays involved here is in violation of substantive provisions of state law.

[10] With all due respect to our concurring colleague, we see little

Desert's judgment on the complaint of unfair competition must also be reversed.[11] This action is premised upon the language of Business and Professions Code section 17200 which defines "unfair competion" to include any "unlawful" business practice. Desert admits that if Naegele's conduct is not forbidden by law, there is no unfair competition. We have concluded that California law cannot be applied to regulate the billboards at issue. And, even if Naegele's conduct could somehow be construed as violative of federal law, state court injunctive relief under the theory of unfair competition is inappropriate.

A similar question was raised in Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588. In that case, plaintiff migratory farmworkers sought an injunction prohibiting defendant ranch owners from knowingly employing illegal aliens. An action alleging unfair competition was brought under former Civil Code section 3369.

The court, while recognizing the farmworkers' need for protection, denied injunctive relief on the basis that federal action through the authority of the Immigration and Naturalization Service would be more efficacious than injunctive relief. "Plaintiffs seek the aid of equity because the national government has breached the commitment

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resemblance between this case and In re Wilson (1981) 30 Cal.3d 21, except for the fact that both involve Indians. The question in *Wilson* was "whether extinguishment of the [Pit River] tribe's Indian title to, or right to occupy, their aboriginal territory operated to extinguish the tribe's aboriginal hunting rights." (*Id.*, at p. 24.) No issue pertaining to regulation of activity on reservations, or of federal preemption, was involved.

[11] Desert initially filed a cross-appeal as to its three other causes of action. This cross-appeal was dismissed at Desert's request on March 8, 1983.

implied by national . . . policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." (*Diaz*, supra, at p. 599.)

As discussed above, it is unclear whether the provisions of the Highway Beautification Act were intended to apply to outdoor advertising on Indian reservations at all. Even if this question were resolved in Desert's favor, however, we have concluded that Interior, rather than the Department, is the appropriate agency to enforce the act's provisions. The sound counsel of the *Diaz* decision, therefore, mandates state abstention in reliance upon federal enforcement in this case.

The summary judgments are reversed.[12]

GRODIN, J.

WE CONCUR:
BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
LUCAS, J.

SEE CONCURRING OPINION

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[12] Because we base our conclusion on grounds of federal preemption, we need not resolve the issue whether, as Naegele asserts, the lawsuits against it should be dismissed pursuant to Code of Civil Procedure section 389 on the basis that the Band is a necessary party which cannot be joined.

COPY

PEOPLE ex. rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

L.A. 31911

CONCURRING OPINION BY MOSK, J.

I concur in the majority opinion.

In doing so, however, I wonder about the appearance of consistency when the court defers to *federal* control of Indian lands in a case involving billboards, after holding that traditional Indian hunting and fishing rights must yield to *state* control in a case involving fish and game laws. (In re Wilson (1981) 30 Cal.3d 21; but see dis. opn. by Mosk, J. and Newman, J., at p. 37 ff.)

To offer a more convincing rationale in the instant matter, and to provide a recognizable pattern in the law, we should take this opportunity to overrule *Wilson.*

MOSK, J.

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc.

L.A. 31911

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TRIAL COURT & NO.:
Riverside County Superior Court
Nos. 126069, 137500
TRIAL JUDGE:
Honorable J. William Mortland

APPENDIX B

CERTIFIED FOR PUBLICATION

COURT OF APPEAL-FOURTH DIST.
FILED
FEB. 28, 1984
KEENAN G. CASADY, Clerk

Deputy Clerk

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

**PEOPLE ex rel.
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4 Civil 27494
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COMPANY OF CALIFORNIA, INC., etc.,**

Defendant and Appellant.

OPINION

APPEAL from the Superior Court of Riverside County. J. William Mortland, Judge. Affirmed.

Best, Best & Krieger, Barton C. Gaut, Ronald J. Kohut and Richard Cross for Appellant Naegele Outdoor Advertising Company of California.

Art Bunce as Amicus Curiae of the Morongo Band of Mission Indians on behalf of Appellant.

Robert F. Carlson, Chief Counsel, Gordon S. Baca, Deputy Chief Counsel, William M. McMillan and Ruby A. Theophile, for Respondent People ex rel. Department of Transportation.

Maxwell, Wright & Wheeler and Sprague Wheeler for Respondent Desert Outdoor Advertising, Inc.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because a resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, we granted its request to file a brief amicus curiae.

I

The Morongo Band of Mission Indians (Band) is a federally-recognized tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created

by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent No. 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities. Upon determining that the highest and best use of this land was outdoor billboard advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor advertising business.

According to the brief of Amicus Curiae, the Band leases some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C., § 415.) Upon submission, approval was denied because the designed purpose, in the department's opinion, would violate the Highway Beautification Act (23 USC, § 131 et seq.) and California's Outdoor Advertising Act (Bus. &Prof. code, § 5200 et seq.).

Appeal was taken to the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office* (1979) 86 I.D. 680.)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency[1] agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act. In its brief the department expresses its philosophy of enforcement: "to control outdoor advertising consistent with state and federal law concern with environmental and aesthetic and safety purposes."

Despite the department's warning and implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and permanent injuction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code,

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[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

requiring display permits. Additionally these displays have been illegally situated in violation of various provisions of the Outdoor Advertising Act. The department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the department's motion, summary judgment resulted.

The action consolidated with that of the Department of Transportation's was initially filed by Desert on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of actions for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structues on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all non-complying structures. The enforcement of this judgment was stayed pending appeal to this court.

II

The Highway Beautification Act contains a particular section dedicated to the control of outdoor advertising. (23 U.S.C., § 131.) Congress has exhibited an intention of controlling outdoor advertising devices adjacent to the interstate highway system "in order to protect the public investment in such highways, to promote the safety and

recreational value of public travel, and to preserve natural beauty." (23 U.S.C., § 131, subd. (a).)

Congress has limited the content of outdoor advertising devices located adjacent to interstate highways. Five acceptable categories have been identified. Loosely defined, they are: (1) Scenic attractions; (2) sale or lease of property; (3) activities conducted on the property on which displays are located; (4) landmarks; and (5) offers of free coffee to travelers. (23 U.S.C., § 131, subd. (c).) The implementation of these limits has been left to the individual states by way of an incentive/punishment system concerning federal-aid highway funds. In 23 United States Code section 131, subdivision (b), Congress provides a state's allotment of federal highway funds shall be reduced by 10 percent for failure to implement "effective control" over outdoor advertising devices. "Effective control" is then defined in the following subdivision to mean the five limits as described above.

California complies with the Highway Beautification Act by its Outdoor Advertising Act, Business and Professions Code section 5200 et seq. The Outdoor Advertising Act's policy behind highway advertising display regulation is "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively. . . ." (Bus. & Prof. Code, § 5226.)

Although outdoor advertising is recognized as a legitimate commercial use of property adjacent to highways (*id.*), several restrictions are imposed. First the advertiser must secure a permit prior to displaying the ad. (Bus. & Prof. Code, § 5350.) The code then limits the content of the

displays to "(1) [d]irectional or other official signs or notices that are required or authorized by law, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions . . . (2) . . . advertising the sale or lease of the property upon which [the displays] are located . . . (3) [those] which advertise the business conducted or services rendered or the goods produced or sold upon the property upon which the advertising display is placed. . . . (4) [m]essage center displays, provided they advertise the business conducted or services rendered or goods produced or sold upon the property upon which the display is placed. . . . (5) [those] erected or maintained pursuant to regulations of the director, and not inconsistent with the national policy set forth in subdivision (f)[2] of Section 131 of Title 23 of the United States Code and the standards promulgated thereunder by the Secretary of Transportation, and designed to give information in the specific interest of the traveling public." (Bus. & Prof. Code, § 5405.) Finally certain safety measures involving size, spacing and location are imposed. (Bus. & Prof. Code, §§ 5403, 5404, and 5408.)

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[2] 23 United States Code section 131, subdivision (f), provides:

"The Secretary shall, in consultation with the States, provide within the right-of-way for areas at appropriate distances from interchanges of the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary."

III

The lower court in both cases concluded the Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

IV

The applicability of a statute is unquestionably an issue of law. (*Killian v. City and County of San Francisco* (1978) 77 Cal.App.3d 1, 7; 6 Witkin, Cal. Procedure (2d ed.) §§ 209-210, pp. 4200-4201.) As such the trial court properly resolved this question by way of summary judgment. Where there is no material issue of fact to be tried and the sole question remaining is one of law, it is the duty of the court to determine the issue of law. (*Angelus Chevrolet v. State of California* (1981) 115 Cal.App.3d 995, 1000; *Zahn v. Canadian Indem. Co.* (1976) 57 Cal.App.3d 509, 512; *Vincent v. State of California* (1971) 22 Cal.App.3d 566, 570.) As indicated below, the Outdoor Advertising Act's applicability hinges on a federal pre-emption approach. To complicate matters, that approach, as it applies to Indians, calls for a balancing of interests. Nevertheless, the main issue here is the applicability of a statute, which is a question of law — properly determined by the lower court.

V

A review of American history reveals the inconsistency with which the Indians have been treated. As the American pioneers forged westward, they in turn pushed the Indians into unexplored lands where they were free to govern themselves. However, continued American westward movement made it evident that the Indians could not be isolated forever. "[T]he United States [therefore] began to consider the Indians less foreign nations and more as a part of our country." (*Organized Village of Kake v. Egan* (1962) 369 U.S. 60, 72 [7 L.Ed.2d 573, 581; 82 S.Ct. 562].) Nevertheless, the Supreme Court committed the United States to a policy of leaving the Indians free from state jurisdiction. The Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (*Worcester v. The State of Georgia* (1832) 6 Pet. 515, 557 [8 L.Ed. 483, 499] overruled on other grounds in *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145 [36 L.Ed.2d 114; 93 S.Ct. 1267].)

Worcester indicated the United States intended to deal with the Indians as sovereigns, however, since that time the Indian sovereignty doctrine has "undergone considerable evolution in response to changed circumstances." (*McClanahan v. Arizona Tax Commission* (1973) 411 U.S. 164, 171 [36 L.Ed.2d 129, 135; 93 S.Ct. 1257] overruled on other grounds in *Bryan v. Itasca County* (1976) 426 U.S. 373 [48 L.Ed.2d 710; 96 S.Ct. 2102.) For example where Indians have left the reservation, state laws have been held applicable to such individuals. (*Oklahoma Tax Com. v. United States* (1943) 319 U.S. 598 [87 L.Ed. 1612; 63 S.Ct.

1284].) And, under certain circumstances, a state may validly assert authority over the affairs of non-Indians on a reservation. *Washington v. Confederate Tribes* (1980) 447 U.S. 134 [65 L.Ed.2d 10; 100 S.Ct. 2069].) The continuing development of this doctrine proves "the relation of the Indian Tribes living within the borders of the United States . . . is an anomolous one and of a complex character. . . ." (*United States v. Kagema* (1886) 118 U.S. 375, 381 [30 L.Ed. 228, 230; 6 S.Ct. 1109].)

The recent Supreme Court trend, at least insofar as the applicability of state laws to Indians is concerned, has been away from the idea of inherent Indian sovereignty and toward reliance on federal pre-emption. (*Rice v. Rehner* (July 1, 1983) 51 U.S.L.Week 5141, 5142.) "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." (*McClanahan v. Arizona Tax Commission, supra,* 411 U.S. 169, 172.)

The question of whether federal law pre-empts the state's exercise of its regulatory authority is not awarded by a traditional pre-emption approach. (*Ramah Navajo Sch. Bd. v. Bureau of Revenue* (1982) 458 U.S. 832 [73 L.Ed.2d 1174, 1180; 102 S.Ct. 3394].) Indian sovereignty, as it has developed now manifests itself in this pre-emption analysis in such a way to "provide a backdrop against which the applicable treaties and federal statutes must be read." (*McClanahan, supra,* 411 U.S. at 172; *Rice, supra,* 51 U.S.L.Week at 5142.) The Supreme Court has articulated this unique pre-emption approach in a variety of ways. "Individualized treatment [is now given to] particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the

respetive rights of States, Indians and the Federal Government." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148 [36 L.Ed.2d 114, 119; 93 S.Ct. 1267].) State law may unlawfully "infringe on the right of reservation Indians to make their own laws and be ruled by them." (*Williams v. Lee* (1959) 358 U.S. 217, 220 [3 L.Ed.2d 251, 254; 79 S.Ct. 269].) "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-emptcd by operation of federal law." (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143 [65 L.Ed.2d 665, 672; 100 S.Ct. 2578].) Pre-emption "calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake. . . . State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the state interests at stake are sufficient to justify assertion of state authority." (*New Mexico v. Mescalero Apache Tribe* (June 13, 1983) 52 U.S.L.Week 4741, 4743-4744.) "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' [Citation.] These traditions themselves reflect the 'accommodation between the interests of the tribes and the federal government, on the one hand, and those of the state, on the other. [Citation.]" (*Rice, supra*, 51 U.S.L.Week at 5142.)

We read from these cases an ad hoc balancing approach[3]

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[3] We are mindful that in applying this balancing approach "[a]mbiguities in the federal law have been construed generously [in the Indian's favor] in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence."(*White Mountain Apache Tribe v. Bracher, supra*, 448 U.S. 136, 143-144.)

concerning pre-emption of state laws as they affect Indians. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." (*Bracker, supra,* 448 U.S. at 144.) Therefore, Indians retain powerful control and authority to regulate their internal and social relations on the reservation. Congress' goal of encouraging tribal self-sufficiency and economic development presents a nearly insurmountable barrier to the states should they attempt to regulate in these particular areas. (*Mescalara Apache Tribe, supra,* 51 U.S.L.Week at 4743-4744.) However, this is not the case with respect to the Outdoor Advertising Act.

In fact, the general context in which this case comes to us is quite different from nearly all the cases to which we are cited. Primarily in these cases no *particular* federal statute is in issue. Rather the issue is whether a particular state statute can be applied to the Indians in light of the strong federal interest of encouraging Indian self-sufficiency and Congress' control over the Indians. (U.S. Const., art. I, § 8, cl. 13.) For example, in *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136, the issue was the applicability of a state license and fuel use tax (not particularly authorized by Congress) to activities of non-Indians engaged in commerce on Indian lands. The court found the state laws pre-empted by applying the balancing approach as discussed above. *Ramah Navajo Sch. Bd. v. Bureau of Revenue, supra,* 458 U.S. 832, and *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1975) 532 F.2d 655, *cert. den., Kings County v. Santa Rosa Band of Indians* (1977)

429 U.S. 1038 [50 L.Ed.2d 748, 97 S.Ct. 121] required the respective courts to determine if certain congressional procedures were so pervasive that they pre-empted the effect of particular state statutes on the Indians. Again, no federal statute was applicable.

Contrast *Leavenworth, etc. R.R. Co. v. United States* (1875) 92 U.S. 733 [23 L.Ed. 634], which presents a similar format to the case at bar. In *Leavenworth*, Congress passed a particular statute allowing the states to acquire certain lands to aid in the construction of railroads. The issue before the court was whether the state could properly acquire Indian reserved lands. The statute was in general terms which neither included nor excluded any particular lands. The court concluded that absent an express declaration, the Indian lands were excluded from this statute. (92 U.S. at 741, 744.) Further the Indian lands were expressly excluded from the act's reach: "That any lands heretofore reserved to the United States, by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this Act. . . ." (92 U.S. at 746.)

The instant case involves a federal statute (Highway Beautification Act) which authorizes the state to act. Unlike the *Leavenworth* statute, the Highway Beautification Act provides:

"All public lands or *reservations of the United States* which are adjacent to any portion of the Interstate system and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." (23 U.S.C., § 131, subd. (h); emphasis supplied.)

We are thus confronted with the issue of whether, in light of the balancing approach discussed above, section 131, subdivision (h), authorizes the state to reach Indian land. In effect, we are dealing with the flip side of pre-emption analysis.

Both sides present strong arguments on whether the Highway Beautification Act authorizes states to control Indian lands particularly in light of section 131, subdivision (h). Plaintiffs point out the House Report summarizing the legislative intent of the Highway Beautification Act supports their interpretation that the Outdoor Advertising Act reaches Indian land: "This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same control, covering other roads which are subject to this legislation." (2 U.S. Code Cong. & Admin. News (1965) 89th Cong., 1st Sess., p. 3717.)

Regarding this same section, plaintiffs assert the term "reservation" had to include Indian reservation because the House discussed *Indian* Reservations in their debates on this legislation: ". . . A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations. . . . South Dakota has at least five great Indian Reservations. Some of the highways pass through some of the reservations. . . . Our fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . [¶] But there is no way in the world that tourists who desire to take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation. . . ."(III Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at p. 24123.)

Desert also points out the legislators were informed that this country contained some 41,000 miles of Interstate Highway. They also knew the Interstate paralleled Indian land; so by specifying "forty-one thousand miles" in the Act (see 23 U.S.C., § 131, subd. (e)(1)) they must necessarily have intended it to apply to the adjacent Indian land.

Further, plaintiffs cite us to *United States V. Portneuf-Marsh Valley R.R. Co.* (1913) 205 F. 416, where at page 419, the court states: "That an Indian reservation is a 'reservation of the United States' admits of little doubt."

Conversely, defendant and amicus curiae argue that the Federal Highway Administration's interpretation of the Highway Beautification Act should be given deference. It concluded the "failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the act on Indian reservations results in nonapplicability to Indian reservations. . . ."

We are also urged to give deference to the Department of the Interior's interpretation that the Highway Beautification Act does not apply to Indian reservations. The Interior department stated that "absence of statutory language expessly including or excluding Indian reservations as territory subject to the [Highway Beautification Act] renders the term 'reservations' as used in section 131(h), ambiguous."[4] And "doubtful statutory language must be interpreted in favor of the Indians." (*Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, supra,* 86 I.D. 680, 687-688.)

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[4] See also *United States v. Celestine* (1909) 215 U.S. 283, 285 [54 L.Ed. 195, 197] for a discussion of inherent problems of interpreting "reservation" always to include Indian country.

Having thus far set out the standards, the law, and the arguments, we must now apply the balancing approach to determine if the Outdoor Advertising Act has been pre-empted. As stated, this is not a traditional pre-emption analysis because (1) the Outdoor Advertising Act affects Indians and (2) there is a Congressional Act which purportedly authorized state regulation. There is no question that the Outdoor Advertising Act effects the Morongo Indian Tribe. Clearly any regulatory scheme limiting economic pursuits will have an effect. However, outdoor advertising can hardly be deemed a traditional Indian custom affecting tribal relations on the reservation.

More importantly, we find the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways. Congress no doubt intended its Highway Beautification Act policies to be applied over all interstate highways. A checkerboard effect would defeat this intent, and such effect is precisely what would result should we find the Outdoor Advertising Act inapplicable in this case. Regarding the displays in this case, we conclude the Outdoor Advertising Act does apply.

Having concluded the Highway Beautification Act authorizes state regulation, we need not and do not reach the issue of whether 28 United States Code section 1360 (Public Law 280) would independently authorize the application of the Outdoor Advertising Act.

VI

Defendant also mounts a procedural attack based on Code section 389,[5] joinder of indispensable party. The argument is made that the Band, as an Indian tribe enjoys immunity from suit.[6] Because the Band is an indispensable

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[5] Code of Civil Procedure section 389, subdivisions (a) and (b) provide:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) if a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

[6] Indian immunity from the governing arm of the state court is not a foregone conclusion in every case. As indicated in the recent *Southwest Forest Industries v. Hupa (Hoopa) Timber Corporation* (Jan. 26, 1984, 1 Civ. AO 15598; 84 D.A.R. 526) — Cal.App.3d —, local tribunals in each instance can and will determine if Congress has authorized state court action. In the present case, however, Indian

party concerning the two ations below, defendant asserts section 389 mandates dismissal.

The failure to join an indispensable party is not a jurisdictional defect mandating dismissal. "[T]he court still has power to render a decision as to the parties before it which will stand." (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 364.) The court must determine whether in "equity and good conscience" the action will proceed. We believe it should and did proceed because there was no pre-emption in this case. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, [citations] such authority may be asserted only if not pre-empted by operation of federal law." (*Mescalero Apache Tribe, supra,* 51 U.S.L.Week at p. 4743.) In this instance, the state courts must necessarily have the power to enforce state laws. The Band may not hide behing this procedural camouflage in order to escape the Outdoor Advertising Act.

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immunity need not be addressed because the Morongo Indian Tribe is not a party.

VII

This judgment as to both actions is affirmed.
CERTIFIED FOR PUBLICATION

Rickles

J.

We concur:

Kaufman

Acting P. J.

McDaniel

J.

APPENDIX C

Order Due
July 31, 1985
SUPREME COURT
Filed
July 10, 1985
LAURENCE P. GILL, Clerk Deputy

ORDER DENYING REHEARING

I. A. No. 31911
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC.

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

OPINION MODIFIED.

Respondent's petition for rehearing is denied.

Acting Chief Justice

COPY

SUPREME COURT
FILED
July 10, 1985
LAURENCE P. GILL, Clerk Deputy

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,
Plaintiff and Respondent,
v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.
Defendant and Appellant.

DESERT OUTDOOR ADVERTISING, INC.
Plaintiff and Respondent,
v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.
Defendant and Appellant.

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, appearing at 38 Cal.3d 509, is modified as follows:

1. On page 513, delete the words "and Desert Outdoor Advertising, Inc. (Desert)" after the words "[i]n 1977 the Band solicited proposals for further leases from several . . . firms including Naegele. . . "

2. On page 517, the cite to *Portneuf-Marsh* should begin: "see . . ." so that the sentence will now read: "The board's interpretation of the Highway Beautification Act is debatable (see United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416 419, affd. (9th Cir. 1914) 213 F. 601,603), but we need not resolve that debate here."

3. On page 522, add the following: "See also People v. McCovey (1984) 36 Cal.3d 517, 525" to be inserted after the following language so that it now reads: "Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that 'a State will certainly be without jurisdiction if its authority is preempted under familar principles of preemption. . . .' (*New Mexico, supra,* 462 U.S. at pp. 333-334. See also People v. McCovey (1984) 36 Cal.3d 517, 525.)"

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, October 7, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "Desert Outdoor Advertising, Inc. vs. Naegele Outdoor Advertising, Co. of California, Inc." in the Supreme Court of the United States, October Term, 1985, No.....

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

BARTON C. GAUT
RONALD J. KOHUT
RICHARD CROSS
BEST, BEST & KREIGER
4200 Orange Street
Riverside, CA 92502

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on October 7, 1985
at Los Angeles, California.

Kathleen Kaltenbach